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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

NADIA HADDADA, Plaintiff and Appellant, v. COLDWELL BANKER RESIDENTIAL BROKERAGE COMPANY, Defendant and Respondent.	D050793 (Super. Ct. No. GIC867761)

APPEAL from orders of the Superior Court of San Diego County, John S. Meyer, Judge. Affirmed.

Nadia Haddada appeals from two separate orders: (1) the trial court's order confirming an arbitration award in her action against Coldwell Banker Residential Brokerage Company (Coldwell Banker), and (2) an order compelling arbitration of her claims against defendants NRT, Inc., NRT California, Jill Morrow, and Vicki Hewlett initiated by litigation during the pendency of her arbitration. We affirm.

FACTUAL AND PROCEDURAL SUMMARY

In December 2004, Nadia Haddada signed a contract to work as a real estate independent contractor for Coldwell Banker. An arbitration agreement provided for arbitration through the American Arbitration Association (AAA). The governing AAA rules authorized the arbitrator to determine "the scope, validity or enforceability of the arbitration agreement."

On January 25, 2006, Haddada initiated arbitration by filing a complaint with AAA, alleging, "Coldwell Banker violated U.S. immigration Labor, and Civil Rights Laws during the period of 2004, 2005, to the present time when they failed to file the proper immigration petition and labor certification with the U.S. Department of Labor, and continued to employ me for the years 2004 and 2005, to present [*Sic*]." The complaint sought $75,000 in damages, plus attorneys' fees and costs, and an injunction directing Coldwell to file the appropriate documents for Haddada to obtain her green card. Coldwell Banker's answer generally denied Haddada's claims.

On June 9, 2006, Haddada appeared at a preliminary and scheduling hearing before the arbitrator. Haddada consented to the arbitrator's jurisdiction, but objected that the arbitration agreement was "one-sided", and "oppressive, and it was drafted by one party, which is Coldwell Banker." The arbitrator declined to rule on the merits of the objection at that time and deferred doing so until a scheduled July 31, 2006 hearing. The following exchange from the preliminary hearing is illustrative:

"Ms. Haddada: . . . [O]ne of my objections [is] that the contract is a standard form, and it's just, you know, one-sided, it's oppressive, and it was drafted by one party, which is Coldwell Banker. That's just to protect myself.

"[Arbitrator:] You have made all of those arguments before. I've read them.

"Ms. Haddada: I did.

"[Arbitrator:] I have read them. Believe me. And, you know, at the trial of the matter, you know, there may be some relevance to the merits of the case, and you certainly are — might be in a position to present some eviden[ce] on that. That's — and I hope you understand the difference [between] evidence and making legal arguments. Once again, you know, I certainly would encourage you to consider getting representation."

The arbitrator's June 9, 2006 "Report of Preliminary Hearing and Scheduling Order No. 1" stated, "Hearing on the merits: Hearing in this matter on the merits will commence before the Arbitrator at the San Diego Regional Office of the AAA . . . on July 31, 2006, . . . and shall continue as needed on the following two days, August 1 and 2, 2006." The arbitrator ordered the parties to complete discovery by July 17, 2006, and submit a prehearing brief outlining the evidentiary basis for their claims by July 24, 2006. Haddada propounded form interrogatories on Coldwell Banker, and served on two executives, Jill Morrow and Vicki Hewlett, deposition subpoenas with document requests.

Notwithstanding the fact her claims were pending before the arbitrator, On June 19, 2006, Haddada filed a complaint in the trial court alleging the same claims as the request for arbitration.

On July 21, 2006, the arbitrator issued an "Order regarding request for stay or dismissal of arbitration," and stated, "The Arbitrator has considered [Haddada's] notice that she has filed an action against [Coldwell Banker] in the Superior Court and her request that, as a result, this arbitration should be stayed or dismissed. In the absence of a court order staying or dismissing the arbitration, I have concluded that, since this matter was properly and voluntarily commenced by [Haddada] pursuant to an express arbitration clause contained in a written agreement between her and [Coldwell Banker], I cannot stay or dismiss this arbitration or modify the existing orders regarding discovery. . . . Consequently, the original arbitration dates . . . shall remain on calendar."

On July 27, 2006, Coldwell Banker filed in the trial court a motion to compel arbitration and stay proceedings pending completion of arbitration.

Haddada failed to appear at the July 31, 2006 hearing on the merits. The arbitrator, pursuant to AAA rules concerning arbitration in the absence of a party, required Coldwell to prove up its case by presenting and introducing into evidence the testimony of all its previously identified witnesses and its documentary evidence. The arbitrator stated in his August 28, 2006 award that notwithstanding Haddada's absence from the trial on the merits, he had, "fully considered such witness and documentary evidence introduced by [Coldwell Banker] as well as [its] Pre-Hearing Brief and supporting documents, the original Demand of [Haddada] and her supporting documents

(including the Agreement), the original Answer of [Coldwell Banker], and the extensive correspondence of both parties to AAA arguing their cases and provided to the Arbitrator by the AAA. Having so considered said evidence and arguments, the Arbitrator holds that [Coldwell Banker] is entitled to an award against [Haddada]."

The arbitrator found as follows: Haddada was an independent contractor, and not a Coldwell Banker employee; therefore, Coldwell Banker had no duty to pay state and federal taxes on Haddada's behalf. In any event, "there was no evidence that any commissions or other compensation have been earned to date by [Haddada] as a result of her previous sales efforts for [Coldwell Banker]." Coldwell Banker had no contractual or legal obligation to file for a green card for Haddada. There was no evidence that Coldwell Banker owed Haddada commissions, and the arbitrator "specifically does not decide whether [Haddada] will become entitled to future commissions on any pending sale or sales or, if she does become so entitled, how much she might be entitled to." Finally, Haddada's "unsupported demand for $75,000.00 of 'monetary damages,' which was asserted in the demand without further characterization or explanation by [Haddada] as to the basis for the claim, and absent any proof supporting such claim, is hereby denied." The arbitrator concluded, "Except as noted above, this AWARD is in full settlement of all claims presented between CLAIMANT and CLAIMANT [*sic*] arising out of performance or breach of the Agreement, and any such claims so arising and not appearing in the above award are hereby denied."

Haddada did not file in the trial court a motion to correct or vacate the arbitrator's award.

On September 15, 2006, the trial court granted Coldwell Banker's motion, ruling that Haddada waived the right to challenge the arbitration agreement. The action was stayed pending completion of arbitration.

On November 7, 2006, Haddada filed in the superior court a first amended complaint, adding as defendants NRT Incorporated dba NRT California[1], its executive Jill Morrow, and its Vice President for Human Affairs, Vicki Hewlett, and alleging that each defendant was a Coldwell Banker agent, employee, or ratified its decisions, and acted "within the course and scope of such above-referenced relationship and agency."

On January 8, 2007, Coldwell Banker filed a motion to confirm the arbitrator's award. The trial court granted the motion, finding that, "There are no meritorious grounds to correct or vacate the [a]ward" under Code of Civil Procedure section 1286.[2]

On February 12, 2007, the trial court granted the motion to compel arbitration brought by defendants NRT, Inc. dba NRT California, Jill Morrow, and Vicki Hewlett. The trial court ruled that all facts alleged in the amended complaint arose out of the relationship between Haddada and Coldwell Banker and its officers, agents or employees. Moreover, Haddada had alleged that these defendants were jointly and severally liable, had acted within the scope of their employment, or their actions were ratified by

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1 NRT Incorporated, is the parent company of Coldwell Banker Residential Brokerage Company.

2 All further statutory references are to the Code of Civil Procedure unless otherwise stated.

Coldwell Banker. The action was stayed until the completion of the arbitration proceeding against the additional defendants.

Haddada appeals the first order on the grounds of unconscionability of the arbitration agreement and the second order on the grounds the defendants were not parties to the arbitration agreement.

DISCUSSION

I.

Citing to *Dream Theater, Inc. v. Dream Theater* (2004) 124 Cal.App.4th 547, 557, Haddada concedes that, "The parties' agreement to arbitrate according to AAA Commercial Arbitration Rules has been held to be 'clear and unmistakable evidence' of parties' intent that arbitrator would decide whether claim was arbitrable." Nonetheless, Haddada relies on several letters she wrote to the arbitrator and her protestation at the June 9, 2006 preliminary hearing for her contention that, "Where (as here) the arbitrator fails to respond to a party's assertions of unconscionability, the arbitrator may be deemed to '[have] failed to arbitrate the dispute according to the terms of the arbitration agreement.' "

We conclude Haddada waived her right to challenge the arbitration agreement by failing to attend the scheduled hearing on the merits, which was the forum the arbitrator designated for a full airing of her contentions regarding the unconscionability of the arbitration agreement. Haddada's previous objections to the arbitration agreement were no substitute for her presentation of evidence and argument at the hearing on the merits. Unsurprisingly, in light of Haddada's failure to attend the hearing, the arbitrator's award

does not specifically discuss whether the arbitration clause was unconscionable. However, the arbitrator stated that in making his findings, he had "fully considered" Haddada's original demand, her supporting documents and "the extensive correspondence of both parties to AAA arguing their cases and provided to the Arbitrator by the AAA." Moreover, the arbitrator expressly noted that any claims arising out of performance or breach of the arbitration agreement that were not specifically referenced in the award were denied. Accordingly, contrary to Haddada, we conclude that the arbitrator found the arbitration agreement was not unconscionable. Under the arbitration agreement, if he had found otherwise, he would not have proceeded to reach the merits of the parties' claims.

A party to arbitration may seek to vacate or correct the award or to have it confirmed. (§ 1285.) Upon a petition seeking any of those results, the court *shall* confirm the award as made, unless it corrects the award and confirms it as corrected, vacates the award or dismisses the proceeding. (§ 1286.) However, such relief must be sought in a timely manner. A court may not vacate an award unless a petition requesting such relief has been duly filed and served (§ 1286.4, subd. (a)) not later than 100 days after the date of service of a signed copy of the award upon the petitioning party. (§ 1288.)

An arbitration award that has not been vacated or confirmed "has the same force and effect as a contract in writing between the parties to the arbitration."

(§ 1287.6) If an award is confirmed, judgment shall be entered thereon, and the judgment is to be treated in all respects like a judgment in "a civil action of the same jurisdictional classification." (§ 1287.4.)

"[I]f a *timely* petition to vacate had been filed, its denial would have directly and necessarily led to entry of a confirmation order which, in turn, would have led to an appealable judgment. . . . [¶] A party who fails to timely file a petition to vacate under section 1286 may not thereafter attack that award by other means on grounds which would have supported an order to vacate." (*Louise Gardens of Encino Homeowners' Assn., Inc. v. Truck Ins. Exchange, Inc.* (2000) 82 Cal.App.4th 648, 659 (*Louise Gardens*).)

Here, the AAA served Haddada with the arbitrator's award on August 29, 2006. Under the statute, she was required to file a verified petition to vacate or correct the arbitrator's award 100 days later, or by December 7, 2006. She did not do so. Therefore, we need not address Haddada's attacks on the award as confirmed by the trial court. Haddada "cannot avoid the consequences of her failure to file a timely petition to vacate by appealing from the postconfirmation judgment." (*Louise Gardens*, *supra*, at p. 660.)

We requested that the parties provide supplemental briefing regarding whether Haddada had complied with the statutory requirements to vacate or correct an award. Although Haddada claims she "raised her objection to the arbitrator's jurisdiction in the numerous pleadings filed in this matter before the arbitrator's award and within 100 days of the Award," she has not pointed to any such pleading in the record that satisfied the statutory requirements. She relies on dicta in *United Firefighters of Los Angeles v. City*

of Los Angeles (1991) 231 Cal.App.3d 1576 that states, "because appellants had nothing new to add to their opposition to the arbitration, requiring them to make a request to vacate the award would be a needless act and a waste of judicial resources." (*Id.* at p. 1582.) That case is inapplicable because the court recognized that "In the instant case, appellants chose not to file a petition to vacate the arbitration award [Citation and footnote] and they do not contest that their response, which did seek to vacate the award, was time barred." (*Id.* at p. 1581.) The court concluded that the appellants were "attacking the authority of the trial court to compel them to submit the matter to arbitration." (*Ibid*.) Here, as Haddada concedes, the arbitration agreement required the arbitrator, and not the trial court, to address the validity, scope and enforceability of the arbitration agreement.

II.

With respect to the trial court's order compelling arbitration of her claims initiated by litigation, the trial court ruled that under the plain language of the arbitration agreement at all times defendants NRT, Inc. dba NRT California, Jill Morrow, and Vicki Hewlett were acting as Coldwell Banker's agents. Accordingly, Haddada's claims against them also were subject to arbitration. (*Dryer v. Los Angeles Ram* (1985) 40 Cal.3d 406, 418 ["If, as the complaint alleges, the individual defendants, though not signatories, were acting as agents . . . then they are entitled to the benefit of the arbitration provisions"]; *Metalclad Corp v. Ventana Environmental Organizational Partnership* (2003) 109 Cal.App.4th 1705, quoting *J.J. Ryan & sons, Inc. v. Rhone Poulenc Textile, S.A.* (4th Cir. 1988) 863 F.2d 315, 320-321 ["When the charges against a parent company and its

subsidiary are based on the same facts and are inherently inseparable, a court may refer claims against the parent to arbitration even though the parent is not formally a party to the arbitration agreement"].) The trial court did not err in compelling arbitration of Haddada's claims against defendants NRT, Inc. dba NRT California, Jill Morrow, and Vicki Hewlett.

DISPOSITION

The orders are affirmed. Coldwell Banker is awarded its costs on appeal.

O'ROURKE, J.

WE CONCUR:

BENKE, Acting P. J.

McINTYRE, J.